No. 85-1581

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD SOLORIO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONER'S REPLY BRIEF

ROBERT W. BRUCE, JR.
Lieutenant Commander
U.S. Coast Guard
2100 Second Street, S.W.
Washington, D.C. 20593-0001
(202) 267-0114
Counsel for Petitioner

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1. The Government asserts that there is a need to "end the confusion resulting from the unstructured question of service-connection." Government's Brief at 47. This assertion misplaces the cause of the confusion, however. Any confusion is the result of the Court of Military Appeals' flexible service-connection analysis, not this Court's service-connection requirement.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), this Court has given remarkably clear guidance for analyzing service-connection questions. This Court's unanimous *Relford* decision, which the Government and the courts below have virtually ignored, is especially clear and helpful. It explicitly sets out an analytic framework consisting of definite criteria,[1] which, in the more than fifteen years since *Relford* was decided, has produced consistent and predictable results.

On the other hand, the Court of Military Appeals' recent flexible service-connection analysis is so pliable it is meaningless. Consequently, it has generated just the kind of confusion this Court sought to prevent when it spelled out its own service-connection analysis in *Relford*.

[1] *Relford v. Commandant*, 401 U.S. at 365 & 367-69 (1971). *See* Brief for the Petitioner 24 n.18 & 25 n.19.

The Government surprisingly suggests that the best way to avoid the confusion resulting from the Court of Military Appeals' erroneous service-connection standard is to do away with the service-connection requirement. Government's Brief 47. But, clearly, requiring adherence to this Court's service-connection analysis is the best way to avoid the confusion which the Court of Military Appeals' flexible analysis engenders. Requiring adherence to the service-connection analysis set out in *O'Callahan*, and *Relford*, will leave intact the settled and well-defined law of service-connection[2] and, moreover, will not result in the abrupt curtailment of servicemembers' right to a civilian trial for civilian offenses.

2. The decision of the Court of Military Appeals should be reversed because it employed an incorrect standard to find that the Alaska offenses were service-connected. Even if the Government were correct in assuming, as it does, that the *Relford* criteria are not exhaustive, Government's Brief 11, that does not mean that lower courts can totally ignore those criteria and decide the service-connection question solely on the basis of a few factors which were not considered important in *O'Callahan* or *Relford*. The *Relford* criteria must be the touchstone for any proper service-connection analysis.

The Court of Military Appeals faithfully followed *O'Callahan* and *Relford* for many years by requiring a thorough, *Relford* service-connection analysis. Only relatively recently,[3] has it begun to depart from its precedents in favor of a more flexible, unstructured standard.

The Government has failed to respond to petitioner's showing that the service-connection standard used by the Court of Military Appeals was improper. Despite its conclusion that the confusion resulting from the unstructured service-connection analysis must end, the Government simply assumes that the Court of Military Appeals' meaningless service-connection test is correct and bases its factual argu-

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[2] Petitioner has shown that service-connection had become a settled and well-defined principle of law. Brief for the Petitioner 36-39.

[3] The Court of Military Appeals began its departure from what it now terms a "slavish" application of the *Relford* criteria in 1980. *See* Brief for the Petitioner 14 n.8.

ment on that improper standard. Just as the military appellate courts below have done, the Government argues that the facts of this case support court-martial jurisdiction without bothering to perform a *Relford* analysis. Rather than apply the *Relford* criteria to balance petitioner's interest in a civilian trial against the military's interest in a court-martial, the Government relies almost entirely upon unproven, theoretical impacts which it infers from the dependent status of the victims and the nature of the Alaska offenses.

On the other hand, petitioner, like the trial judge,[4] has set out a thorough and detailed *Relford* analysis which shows that the issue of service-connection is not even a close question here; none of the *Relford* criteria support court-martial jurisdiction.[5]

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[4] The Government objects to petitioner's reference to the trial judge's findings of fact without noting that the Court of Military Review held some findings of fact to be erroneous. Government's Brief 4 n.1. This appeal, however, is from the decision of the Court of Military Appeals, and that court specifically criticized that aspect of the Coast Guard Court's decision, stating:

> A military judge's fact finding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62, *see United States v. Burris*, 21 M.J. 140 (C.M.A. 1985). To some extent the Court of Military Review may have erred in this direction; but any such error is immaterial, because, on the basis of undisputed facts, we conclude that the offenses in Alaska were service-connected.

United States v. Solorio, 21 M.J. 251, 254 (C.M.A. 1986), cert. granted, ___U.S. ___, 106 S.Ct. 2914 (1986), Pet. App. 8a.

[5] The Government argues that even if the petitioner's offenses had a "reduced" impact on the military, because of the "fortuities" of this case, court-martial jurisdiction should be upheld. Government's Brief 18. Ignoring the fact that *O'Callahan* and *Relford* require service-connection to be determined on the facts of each case, *Relford* 401 U.S. 365-66 & 369, the Government suggests that petitioner's offenses, *per se*, justify finding service-connection "as long as offenses of that nature typically, or as a class," have a significant impact on the military. Government's Brief 18 n.18. Of course, even if this Court were to overrule its precedents and accept this proposition, the Government has failed to prove that petitioner's offenses are of a nature, or belong to a class, such that they typically have a significant effect upon the military.

3. Having failed to address the correct service-connection standard, the Government goes on to create strawmen based on positions petitioner has not taken. The Government states that petitioner is critical of decisions extending court-martial jurisdiction to off-base offenses, and that petitioner seeks, in effect, to limit court-martial jurisdiction to on-base offenses. Government's Brief 21; *see also id.* at 17 & 28.

This is absolutely incorrect. Petitioner seeks only to leave intact the settled and well-defined law of service-connection. *See supra* p. 2. Under those settled principles, crimes committed off-base in peacetime can be tried by court-martial if they are petty offenses, offenses committed overseas, uniquely military offenses, offenses having a significant impact upon a military installation, and offenses involving military status. Brief for the Petitioner 38. What petitioner has criticized is the use of an improper service-connection standard to greatly expand court-martial jurisdiction beyond these limits.

a. The Government discusses the military interest in preventing drug abuse at length. Government's Brief at 21-23 & 42-43. This case does not involve drug offenses, however, and a finding that the facts of this case do not support court-martial jurisdiction will not affect jurisdiction over off-base drug offenses. The Court of Military Appeals' rationale for holding most drug offenses to be service-connected is their pervasive impact on military readiness, making the prohibition of drug use, arguably, a proper exercise of authority stemming from the war power. *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980); *But see* Note, *Service-Connection and Drug Related Offenses: The Military Court's Ever-Expanding Jurisdiction*, 54 Geo.Wash.L.Rev. 118 (1985) (the authors are highly critical of the Court of Military Appeals' recent service-connection analysis, in general, and its application to drug offenses in *Trottier*, in particular). That issue is not now before this Court, however, and need not be addressed.[6] Whatever a fully developed

[6] The case in which the Court of Military Appeals held that most drug offenses are service-connected, *Trottier*, 9 M.J. 337, was decided before servicemembers were permitted to directly appeal to this Court. Addressing that issue, in the abstract, in this case would represent an advisory opinion. If the issue is as pressing as the Government, by its heavy emphasis on the point, seems to believe, a case will certainly present itself in which the matter can be properly decided with the benefit of a fully developed record.

record in a drug case might reveal about the impact of drug abuse on the military, there has been no suggestion that sex offenses against dependents have a similar effect on readiness or are otherwise related to authority stemming from the war power.

b. The Government also argues at length about the armed services' interest in military families, the military community and military commands. Government's Brief 12-18. This is not a case, however, where the Coast Guard's interest in a military community or a military command is really an issue. After ample opportunity, the Government was unable to prove that any such interests have suffered in a significant way from petitioner's Alaska offenses. The time to have proven such an impact was at trial, not by rationalization on appeal.

One of the most significant reasons for finding that the offenses here are not service-connected is the fact that there is no Coast Guard enclave at Juneau and, consequently, there is no Coast Guard community separate and distinct from the civilian community.[7] Brief for the Petitioner 4, 23, 28-30.

[7] In *O'Callahan*, this Court established that the commission of an offense off-base was a relevant factor tending to show that service-connection was lacking. In *Relford*, this factor was given even greater significance by the holding that virtually all on-base offenses are service-connected. In *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983), the Court of Military Appeals muddled this Court's straightforward distinction between on-base and off-base offenses, and turned that distinction on its head, holding that the proximity of an off-base offense to a military installation is relevant, and is a factor tending to *support* service-connection. This holding was made despite the court's recognition of "the fact that *O'Callahan* itself involved an off-post crime committed in a city located near several military installations." *Id.* at 9. The court stated that this new factor is "quite relevant to service connection" because,

> [a]n offense committed by a servicemember near a military installation tends to injure relationships between the military community and

There could be no impact from petitioner's offenses on a military base or on a military community at Juneau, because no military base and no military community distinct from the civilian community exists there. *Id.*

The Alaska offenses had *no impact* on the Coast Guard command at Juneau. Indeed, they were not even reported until after petitioner, the victims and their families had all left the command. *Id.* at 5, 29-30. There is not even any evidence that anyone in Juneau, outside of law enforcement circles, has ever become aware of these offenses. *Id.* at 5, 32. Moreover, any impact on the Coast Guard's interest in military families, the military community and the military command at Governors Island, where petitioner was tried, obviously resulted from the offenses he committed there, rather than from the Alaska offenses. *Id.* at 30-31.

Finally, the military families to which the victims of petitioner's offenses belonged lived in the civilian community, *id.* at 4, and depended on civil authorities, rather than the Coast

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the civilian community and thereby makes it more difficult for servicemembers to receive needed local support. In a sense, Lockwood's actions tended to injure the base population at Sheppard Air Force Base.

Id. Lockwood is one of the major service-connection cases decided after the Court of Military Appeals began to take an expansive view of court-martial jurisdiction. The case was not subject to direct review by this Court, because it was decided before servicemembers were permitted to appeal directly. Although the correctness of this holding is highly questionable, if the Court of Military Appeals' holding is accepted for arguments sake, it logically follows that the absence of any military enclave in proximity to the off-base offense is a factor weighing heavily against service-connection. Moreover, even if proximity to a military base is not relevant *per se*, the lack of proximity obviously can result in a factual absence of any significant impact from the offense on the military. This point is independently supported by the Court of Military Appeals' observation that

Relford recognized the importance of "geographical" relationships and it noted that, according to a passage from W. Winthrop, *Military Law and Precedents* (2d ed. 1920 reprint), on which both the majority and dissenters relied in *O'Callahan*, a crime was punishable by court-martial even when committed against a civilian "near" a military post. 401 U.S. at 368, 91 S.Ct. at 657.

Id.

Guard, for police protection. Their associations with petitioner merely as a neighbor were much more significant than any associations resulting from his being a member of the Coast Guard. *Id.* at 4-5, 27. Therefore, finding that the facts of this case do not support court-martial jurisdiction will not deprive the services of jurisdiction over off-base offenses where there is, in fact, a significant impact on their interest in military families, the military community and military commands.

4. Factually, the Government has failed to prove any significant impact on the Coast Guard's interest in military families, the military community and military commands. It also argues, therefore, that these interests, *in the abstract*, justify holding that the dependent status of a victim is, *per se*, sufficient to make an offense service-connected, Government's Brief 12, or justify reconsidering *O'Callahan* and *Relford*, *id.* at 28. There is no basis for this argument.

Obviously, courts-martial cannot settle all of the problems of military families, or even punish all of the crimes committed against them. Courts-martial can only address criminal offenses committed by servicemembers. Without diminishing the importance of military families and the military community, this Court can recognize that courts-martial are not ideally suited for use as a family advocacy tool.[8] Such use of the military justice system ranges far afield of its real purpose, which is to maintain discipline in the armed forces. Digressions from that purpose weaken rather than strengthen the military justice system.

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[8] The Government has cited the Military Family Act of 1985, Pub. L. No. 99-145, 99 Stat. 678 *et seq.*, as evidence of Congress' recognition that military families' positive view of service life is important to recruitment, morale and retention of servicemembers. Government's Brief 12. There is nothing in the Act, however, to indicate that Congress felt that limits on court-martial jurisdiction cause military families to have a more negative view of service life. In fact, it is perfectly reasonable to expect that expansion of court-martial jurisdiction, with the attendant loss of constitutional protections, to include civilian offenses that are not service-connected, would actually be a disincentive to recruitment, morale and retention, causing servicemembers, and their families, to have a more negative view of service life.

Although the Government argues as if there were no reasonable alternative to courts-martial,[9] the military justice system is clearly meant to be a limited adjunct to the federal and state criminal justice systems for crimes committed within this country.[10] The law of service-connection, developed under *O'Callahan* and *Relford*, gives appropriate weight to the armed services' interest in protecting military families, the military community and military commands. But, correctly, it does not hold that the military interest in every case is sufficient to outweigh the servicemember accused's interest in a civilian trial.

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[9] The Government argues that the military must be able to punish servicemembers for offenses committed against dependents, as if the only alternative is for parents or other members of the military community to seek their own vengeance. Government Brief 14-15. Regardless of the fact that alternatives do exist, this argument cannot have been intended seriously; court-martial jurisdiction does not expand, and constitutional rights do not contract, as necessary to ward off vigilantism by military personnel.

[10] In *United States v. Mariea*, 795 F.2d 1094 (1st Cir. 1986), the court noted "[i]t is clear that for service personnel – especially those stationed in this country in times of peace – military justice was designed to supplement, not displace, the civilian criminal justice system." *Id.* at 1101. The Government asserts that this Court's principal reason for limiting court-martial jurisdiction is that the military justice system did not adequately protect servicemembers charged with crimes. Government's Brief 32. It then goes on to compare the military justice system to the federal and state criminal justice systems, as if the military were a sovereign state and the military justice system were designed for the same purposes as the federal and state criminal justice systems. *Id.* at 32-40, 44-46. Petitioner certainly does not agree that the military justice system gives servicemembers the same constitutional protections as the federal and state criminal justice systems. *See infra* p. 12-15. But, the Government's argument has a more fundamental flaw. Court-martial jurisdiction is limited, because the military justice system is basically different from the federal and state criminal justice systems; its overriding purpose is to maintain discipline in the armed forces. *O'Callahan*, 395 U.S. at 261-65. Moreover, court-martial jurisdiction is limited because of an historical "disapproval of the general use of military courts for trial of ordinary crimes." *Id.* at 268 [footnote omitted]. The *O'Callahan* decision notes an abiding suspicion of courts-martial, resulting from abuses of their power, from England, before the American Revolution, throughout our national history. *Id.* at 268-72.

Offenses committed by servicemembers against military families on a military base, where military police under the direction of a base commander provide protection, are presumed to be service-connected. However, when such offenses are committed off-base, where civilian police under the direction of civil authorities provide protection, a significant impact on the military – a service-connection – must be proven to justify court-martial jurisdiction.

Upholding these principles and reaffirming their correctness in this case, would not, as the Government suggests, limit court-martial jurisdiction to on-base offenses. Government's Brief 17. The service-connection requirement has never completely barred court-martial jurisdiction over off-base offenses. *See supra* p. 4 & note 7.

There is no basis for the Government's implicit suggestion that the commander of an army unit on maneuvers or a ship away from home port would be unable to maintain discipline in the unit. Government's Brief 16. The on-duty status of the servicemember has always been an important factor supporting court-martial jurisdiction. Obviously, offenses committed by servicemembers while deployed in the field, or underway on a ship, will almost certainly be service-connected.

Finally, abstractions such as those advanced by the Government had less to do with the decision to try petitioner at court-martial than trial tactics. What the Government is seeking is greater flexibility to try accuseds in the forum that most disadvantages the defendant, whether it is a court-martial or a civilian court. In this case, the Government preferred trial by court-martial because it wanted to join the Alaska offenses with the New York offenses.

Many of the offenses involved ambiguous situations. The evidence as to the New York offenses was weaker than the evidence as to the Alaska offenses because the victims were younger and their credibility was questionable. Evidence of a criminal intent as to the Alaska offenses, while still insufficient, was somewhat stronger. Trying all of the offenses at once made a much more convincing case, and this could only be done in a court-martial with its worldwide jurisdiction and

liberal joinder of offenses rules. The Government could have proceeded with prosecution of the New York offenses at any time during the months that it appealed the dismissal of the Alaska offenses, but the Government chose to wait for the outcome of its appeal so that it could try all the offenses together.

While the Government is arguing here that it needs greater jurisdiction over off-base offenses, in a series of recent cases it has argued that *on-base* drunk driving charges should be tried in the district courts, over the objection of the accused. *E.g., United States v. Mariea*, 795 F.2d 1094 (1st Cir. 1986); *United States v. Walker*, 552 F.2d 566 (4th Cir), *cert. denied*, 434 U.S. 848 (1977); *United States v. Fulkerson*, 631 F.Supp. 319 (D. Hawaii 1986); *United States v. O'Byrne*, 423 F.Supp. 588 (E.D. Va. 1973). In *Mariea*, trial in district court tended to disadvantage the accuseds because they could be convicted either on the basis of being under the influence of alcohol or having a certain blood alcohol content. *See* 795 F.2d at 1096 n.2. In a court-martial the Government would have had to prove that the accuseds were drunk. *See id.* at 1097 n.6. Moreover, the court noted in *Mariea* that the civilian system subjected the accused to "possibly harsher, laws and punishments." *Id.* at 1100; *see id.* n.16.

Certainly, any abstract military interest in military families, military communities and military commands is not sufficient to support court-martial jurisdiction in this case. Moreover, reconsideration of *O'Callahan* and *Relford* is not called for because this Court's service-connection test adequately protects those interests.

5. The Government suggests that *O'Callahan* should be reconsidered because it was a radical departure from this Court's prior decisions, Government's Brief 30, and because Congress is better suited than this Court to make judgments about the permissible limits of court-martial jurisdiction, *id.* at 41. The *O'Callahan* decision cannot correctly be described as a radical departure from this Court's prior decisions. As this Court noted in *O'Callahan*:

> We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the time of both the offense and the trial. Thus, discharged soldiers cannot be court-martialed for offenses committed while in service. *Toth v. Quarles*, 350 U.S. 11. Similarly, neither civilian employees of the Armed Forces overseas, *McElroy v. Guagliardo*, 361 U.S. 281; *Grisham v. Hagan*, 361 U.S. 278; nor civilian dependents of military personnel accompanying them overseas, *Kinsella v. Singleton*, 361 U.S. 234; *Reid v. Covert*, 354 U.S. 1, may be tried by court-martial.

395 U.S. at 267. The service-connection requirement is simply an extension of these decisions limiting court-martial jurisdiction.

Moreover, if this Court accepts the Government's argument that Congress and military commanders are better suited than this Court to make judgments about the permissible limits of court-martial jurisdiction, there is no logical reason to stop at reconsidering the service-connection requirement. If this Court must defer to Congress and the President, because limitations on court-martial jurisdiction are solely within the scope of their authority over national defense and military affairs, then this Court's decisions limiting court-martial jurisdiction over discharged soldiers, civilian employees and dependents were also wrongly decided.

Obviously, there are constitutional limits on Congress' authority to extend court-martial jurisdiction. In *O'Callahan*, this Court found that prosecution of offenses that are not service-connected is beyond the scope of Congress' authority over national defense and military affairs, or is at least a constitutionally inappropriate use of that authority. Therefore, the Government's argument that this Court should abandon the service-connection test and instead defer to the Congress and military commanders is without basis.

6. The Government argues that the military justice system now compares more favorably to civilian criminal justice system than it did before *O'Callahan* was decided. Government's Brief 32-40. Petitioner has already shown that the procedural shortcomings of a trial by court-martial are

not the only reason for limiting court-martial jurisdiction to service-connected offenses. *Supra* note 10. Moreover, the Government's argument dismisses, or fails to recognize the fact, that the most important changes were passed by Congress before *O'Callahan* was decided, and had been implemented by the time *Relford* was decided two years later.

The Government cites "three major congessional amendments to the UCMJ, two major revisions of the *Manual for Courts-Martial,* the promulgation of regulations by each branch of the armed forces governing criminal procedure, and the experience gained by military courts in criminal law and procedure," Government's Brief 33 (footnotes omitted), as having made the military justice system comparable to a civilian criminal justice system, *id.* All of the most significant changes providing protections for the accused, however, are the result of the Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat. 1335. The *Manual for Courts-Martial* was revised in 1969 to implement that Act, and since then the changes to the military justice system have been relatively minor. Their net effect has benefited the Government more than military accuseds.[11]

Despite the changes described by the Government, fundamental differences between the military justice system and civilian criminal justice systems remain. Some of the defi-

[11] For example: the Military Justice Amendments of 1981, Pub.L.No. 97-81, 95 Stat. 1085, for the first time allow commanders to involuntarily place certain servicemembers in a leave without pay status during their appeals, *id.* at § 2(c)(1), 95 Stat. 1087 (Art. 76a, 10 U.S.C. § 876a (1982)), authorize starting the 60 day time limitation for seeking further appeal by constructive, rather than personal, service of Court of Military Review decisions, *id.* at § 5, 95 Stat. 1088 (Art. 67(c)(2), 10 U.S.C. § 867(c)(2) (1982)), and give the services sweeping power to restrict the right to individual military counsel by allowing them to define "reasonably available", *id.* at § 4(b), 95 Stat. 1088 (Art. 38(b)(7), 10 U.S.C. § 838(b)(7) (1982)); the Military Justice Act of 1983, Pub.L.No. 98-209, 97 Stat. 1393, for the first time authorizes government appeals, *id.* at § 5(c)(1), 97 Stat. 1398 (Art. 62, 10 U.S.C. § 862 (Supp. I 1983)), and allows convening authorities to execute any punishments, except for death or a punitive discharge, without conducting any legal review of the court-martial or taking any action on the findings, *id.* at § 5(a)(1), 97 Stat. 1395 (Art. 60(c), 10 U.S.C. § 860(c) (Supp. I 1983)).

ciencies in the military justice system are inherent; they, most likely, will never change. The Government's claim that the 1984 revisions to the *Manual for Courts-Martial* have conformed court-martial procedure to Federal practice, and that remaining differences "cannot be described as 'substantial,' " Government's Brief 37 (ctiation omitted), is simply incredible.

Certainly one substantial difference that remains is the extraordinary control over the law enforcement, prosecution and adjudicative functions that is combined in the commanding officer with authority to convene courts-martial. Unlike civilian criminal justice systems, these functions are not kept separate and detached in the military justice system. As a result, these commanding officers, called convening authorities, still have immense power to influence every step of the court-martial process.

A convening authority can initiate and direct investigations within his command. Rule 303, Rules for Courts-Martial [RCM], Manual for Courts-Martial, United States, 1984 [MCM 1984]. In furtherance of such an investigation, the convening authority can authorize searches for evidence without complying with procedural requirements like those prescribed by Rule 41(c), Federal Rules of Criminal Procedure [Fed.R.Crim.P.] (requiring that all information supporting a search warrant be obtained under oath and be in writing or be recorded at the time the warrant is issued). Rule 315, Military Rules of Evidence, MCM 1984.

If any charges result from the investigation, the convening authority can refer them to court-martial. Rules 404 and 407, RCM, MCM 1984. In some cases an Article 32, 10 U.S.C. § 832 (1982), pre-trial investigation is required but, regardless of the investigating officer's recommendation, the convening authority can refer the charges to court-martial, as long as he is advised, or reasonably believes, that the evidence warrants the charges. Art. 34, 10 U.S.C. § 834 (Supp. III 1985); Rule 601(d), RCM, MCM 1984.

The convening authority still hand picks the members of the court-martial who sit as finders of fact, Art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1982); Rule 503(a)(1), RCM, MCM 1984,

unless the accused chooses trial by judge alone. Furthermore, only a two-thirds vote is required to convict, except where the death penalty is mandatory, Art. 52(a), 10 U.S.. § 852(a) (1982). This jury is not required to be any larger than five members, even in the most serious cases. Art. 16, 10 U.S.C. § 816 (1982 & Supp. III 1985); Rule 501(a)(1), RCM, MCM 1984. Moreover, the accused is allowed only one peremptory challenge to this hand-picked panel, Art. 41(b), 10 U.S.C. § 841(b) (1982); Rule 912(g)(1), RCM, MCM 1984, a significant difference from Rule 24, Fed.R.Crim.P. This permits a court member to sit on a court-martial without being subject to peremptory challenge at all, when added to the court to bring it up to a quorum after the accused has used his peremptory challenge. *See United States v. Holley*, 17 M.J. 361 (C.M.A. 1984).

Deferment of sentence, which the Government likens to post-trial bail, Government's Brief 39, is granted or denied by the convening authority at his discretion. Rule 1101(c), RCM, MCM 1984. And, as petitioner has already noted, *supra* note 11, the convening authority can execute any punishments, except for death or a punitive discharge, without conducting a legal review of the court-martial and without even acting on its findings. Art. 60, 10 U.S.C. § 860 (Supp. III 1985); Rule 1107(a)-(d), RCM, MCM 1984.

While the extraordinary power combined in the convening authority, when exercised lawfully, is itself a substantial difference from civilian criminal justice systems, the resulting problem of unlawful command influence is totally out of place in any fair system of criminal justice. Unfortunately, neither Congress nor the military courts have found a way to eliminate this continuing problem in military justice.

The Government suggests, in quite sweeping language, that the attempts of military courts to remedy the damage done by unlawful command influence, where it can be demonstrated, is a vindication of the military justice system rather than a reason to restrict its jurisdiction.[12] Govern-

[12] In a recent case, *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), petition for cert. filed, 55 U.S.L.W. 3412 (U.S. November 21, 1986), the Court of Military Appeals recognized that "[m]erely remedying the error in

ment's Brief 36. Obviously, however, command influence, whether lawful or unlawful, is an important reason for restricting court-martial jurisidiction to cases involving significant military interests. This Court's service-connection requirement has done no more than that.

The Government has also suggested that the arrangements under which military judges serve ensure that they have the same judicial independence as civilian judges. Government's Brief 34-35. Citing *Palmore v. United States*, 411 U.S. 389, 410 (1973), the Government argues that a servicemember tried before a military judge is in the same position as a defendant tried in a state court. Government's Brief 35 n.32. This argument, however, fails to recognize that military judges enjoy no term of office at all. Not only are they untenured, they serve as judges only so long as they have military orders assigning them judicial duties. In effect, they serve at the pleasure of the military service of which they are a part.

There is, in fact, a substantial difference between being tried by a state judge who has the protection of a term of office, and a military judge who does not. This difference is a sufficient basis for treating civilian trials as constitutionally preferable to courts-martial.[13]

While certainly not exhaustive, these examples ought to be sufficient to demonstrate that there continue to be substantial differences between trial by a court-martial and trial by a civilian court – differences which cause the military courts to come in a distant second in protecting the rights of

cases before us is not enough." *Id.* at 400. However, all it did beside that is warn that "incidents of illegal command influence simply must not recur in other commands in the future" and that it would "consider much more drastic remedies" in future cases. *Id.*

[13] This case does not call on the Court to determine whether a military judge, who serves without any term of office, may constitutionally try serious felony charges in peacetime within the continental limits of the United States. Whether the circumstances under which military judges serve violate Fifth Amendment due process should be addressed in a case directly raising that issue. Such a case is currently before the Court. *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986), petition for cert. filed, 55 U.S.L.W. 3495 (U.S. January 2, 1987).

criminal accuseds. Together with the fundamental difference in purpose between these systems and the historic suspicion of courts-martial, these are ample grounds for the limitation of court-martial jurisdiction to service-connected offenses.

7. The Government argues that application of the Court of Military Appeals' decision, retroactively expanding court-martial jurisdiction – in a complete departure from its closest precedents on point – to petitioner, does not violate due process in the manner of an *ex post facto* law. Government's Brief 23-28. The Government, however, deals with only one aspect of the due process problem; it takes the position that petitioner cannot claim any due process violation because he had fair notice that his conduct was criminal under Alaska law. *Id.* at 25. This argument ignores the fact that the retroactive expansion of court-martial jurisdiction has disadvantaged petitioner by depriving him, without notice, of a complete jurisdictional defense, barring trial by court-martial, and of constitutional protections he would have had in a civilian trial.

Moreover, the addition of a military criminal sanction to that allowed under Alaska law retroactively increases the penalty that existed when the offenses were committed. Alaska and the United States being separate sovereigns, each can prosecute if court-martial jurisdiction is expanded to include these offenses, Rule 201(d)(2), RCM, MCM 1984; *see e.g. United States v. Wheeler*, 435 U.S. 313 (1978), and the sentences would be *cumulative*. Article 14(b), UCMJ, 10 U.S.C. § 814(b) (1982). Therefore, the penalties petitioner faces have been increased retroactively as a result of the Court of Military Appeals' decision.[14]

Both disadvantage to the accused's substantial rights, and enhancement of the punishment, are well accepted as effects that justify finding an *ex post facto* violation. *Weaver v.*

[14] The fact that Alaska has chosen, so far, not to prosecute, or that the military sentence is less than what could have been adjudged under Alaska law, is immaterial since *ex post facto* analysis looks to what might have been adjudged rather than the actual sentence. *See Weaver v. Graham*, 450 U.S. 24, 30, 32 n.17 & 33 (1981); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

Graham, 450 U.S. 24 (1981); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Thompson v. Utah*, 170 U.S. 343 (1898); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Kring v. Missouri*, 107 U.S. 221 (1883). The Government's characterization of the service-connection requirement as merely a "procedural barrier", Government's Brief 26, is erroneous and, in any event, irrelevant. This Court has stated that "[a]lteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. *Thompson v. Utah*, 170 U.S. 343, 354-355, 18 S.Ct. 620, 624, 42 L.Ed. 1061 (1898); *Kring v. Missouri*, [107 U.S. 221, 232, 2 S.Ct. 443, 452 (1883)]." *Weaver v. Graham*, 450 U.S. at 29 n.12.

There is no basis for the Government's suggestion that the Court of Military Appeals' decision was foreseeable, because the precedents petitioner relied upon are inconsistent with *Relford*. Government's Brief 27. The Government's claim that *McGonigal*, *Shockley*, and *Henderson*[15] decisions turned on the lack of a connection between the offenses and the accused's military duties, rather than the off-base location of the offenses, is most clearly belied by the *Shockley* case, which involved both on-base and off-base offenses. There, the on-base offenses were found to be, and the off-base offenses were found not to be, service-connected; a result clearly consistent with *Relford*.

Moreover, the Court of Military Appeals has not simply reconsidered its prior decisions in light of a consistent interpretation of *Relford*, as the Government implies. Government's Brief 27. What it has done, is reconsider its interpretation of *O'Callahan* and *Relford* so as to free itself to greatly expand court-martial jurisdiction beyond the constitutional limits set out in those cases. The *Relford* decision, which was rendered fifteen years ago, is not the reason for the Court of Military Appeals' recent departure from its earlier decisions. Rather, the Court of Military Appeals has stated that its departure is based on what it perceives to be

[15] *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

changed conditions. *United States v. Solorio*, 21 M.J. at 254-55, Pet. App. at 9a-10a.

The *McGonigal*, *Shockley*, and *Henderson* decisions are consistent with this Court's decisions in *O'Callahan* and *Relford* and are roughly contemporaneous with those decisions. Petitioner certainly could not foresee that the Court of Military Appeals would reject its own precedents and decide the instant case in a way that conflicts with *O'Callahan* and *Relford*.

Finally, the Government's reliance on *United States v. Ross*, 456 U.S. 798 (1982), is misplaced. Government's Brief 26. The issue being addressed in *Ross*, was the applicability of the doctrine of *stare decisis*, rather than any possible violation of due process, in the manner of an *ex post facto* law. 456 U.S. at 824. In any event, *Ross* does not stand for the proposition that accuseds may not rely on common law resulting from case by case determinations. *See* Government's Brief 26.

In *Ross*, this Court found that "[t]he exception recognized in *Carroll* is unquestionably one that is 'specifically established and well delineated.' " 456 U.S. at 825. Apparently it was that established and well delineated exception, rather than the cases offered by Ross, that warranted reliance. That is why the Court, in *Ross*, found that "no legitimate reliance interest can be frustrated by our decision today."[16] *Id.* at 824. There is no reason to believe that the Court meant to hold that any rule of common law can be changed retrospectively, regardless of its effect on accuseds, by courts or legislatures, without violating due process or the *Ex Post Facto* Clause.

Application of the Court of Military Appeals' decision, retroactively expanding court-martial jurisdiction, to petitioner is a violation of due process, in the manner of an *ex post facto* law. It has deprived him of a defense he had, barring trial by court-martial on the Alaska charges; consequently,

[16] As a practical matter, Ross could not have relied on *Robbins v. California*, 453 U.S. 420 (1981), or *Arkansas v. Sanders*, 442 U.S. 753 (1979), at the time he committed his crime, November 27, 1978, *Ross*, 456 U.S. at 800, anyway. *Sanders* was decided June 20, 1979, and *Robbins* was decided on July 1, 1981.

petitioner has been denied constitutional rights he would have been afforded in state court, and the punishment he faces has been enhanced.

8. For the reasons stated above, and in Petitioner's Brief, the judgment of the Court of Military Appeals should be reversed, and the trial judge's ruling dismissing the Alaska offenses for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

ROBERT W. BRUCE, JR.
Lieutenant Commander
U.S. Coast Guard
2100 Second Street, S.W.
Washington, D.C.
(202) 267-0114
Counsel for Petitioner

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